

## §511.76

## 49 CFR Ch. V (10–1–02 Edition)

### §511.76 Qualifications and standards of conduct.

(a) The NHTSA expects all persons appearing in proceedings before it to act with integrity, with respect, and in an ethical manner. Business transacted before and with the NHTSA shall be in good faith.

(b) To maintain orderly proceedings, the Presiding Officer or the Administrator, as appropriate under this part, may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against certain *ex parte* communications. The Presiding Officer may, in addition to the above sanctions, deny access to additional *in camera* materials when a party or participant publicly releases such materials without authorization.

(c) An excluded party, participant, or representative thereof may petition the Administrator to entertain an interlocutory appeal in accordance with §511.24. If, after such appeal, the representative of a party or participant, is excluded, the hearing shall, at the request of the party or participant, be suspended for a reasonable time so that the party or participant may obtain another representative.

### §511.77 Restrictions as to former members and employees.

The postemployee restrictions applicable to former Administrators and NHTSA employees, as set forth in 18 U.S.C. 207, shall govern the activities of former Administrators and NHTSA employees in matters connected with their former duties and responsibilities.

### §511.78 Prohibited communications.

(a) *Applicability.* This section is applicable during the period commencing with the date of issuance of a complaint and ending upon final NHTSA action in the matter.

(b) *Definitions.* (1) “Decision-maker” means those NHTSA personnel who render decisions in adjudicative proceedings under this part, or who advise

officials who render such decisions, including:

(i) The Administrator,

(ii) The Administrative Law Judges;

(2) “*Ex parte* communication” means:

(i) Any written communication other than a request for a status report on the proceeding made to a decisionmaker by any person other than a decisionmaker which is not served on all parties,

(ii) Any oral communication other than a request for a status report on the proceeding made to a decisionmaker by any person other than a decisionmaker without advance notice to the parties to the proceeding and opportunity for them to be present.

(c) *Prohibited ex parte communications.* Any oral or written *ex parte* communication relative to the merits of a proceeding under this part is a prohibited *ex parte* communication, except as provided in paragraph (d) of this section.

(d) *Permissible ex parte communications.* The following communications shall not be prohibited under this section:

(1) *Ex parte* communications authorized by statute or by this part.

(2) Any staff communication concerning judicial review or judicial enforcement in any matter pending before or decided by the Administrator.

(e) *Procedures for handling prohibited ex parte communication.* (1) Prohibited written *ex parte* communication. To the extent possible, a prohibited written *ex parte* communication received by any NHTSA employee shall be forwarded to the Docket Section rather than to a decisionmaker. A prohibited written *ex parte* communication which reaches a decisionmaker shall be forwarded by the decisionmaker to the Docket Section. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

(2) Prohibited oral *ex parte* communication. (i) If a prohibited oral *ex parte* communication is made to a decisionmaker, he or she shall advise the person making the communication that the communication is prohibited and shall terminate the discussion.

(ii) In the event of a prohibited oral *ex parte* communication, the decision-maker shall forward to the Docket Section a dated statement containing such of the following information as is known to him/her:

(A) The title and docket number of the proceeding;

(B) The name and address of the person making the communication and his/her relationship (if any) to the parties to the proceeding;

(C) The date and time of the communication, its duration, and the circumstances (telephone call, personal interview, etc.) under which it was made;

(D) A brief statement of the substance of the matters discussed;

(E) Whether the person making the communication persisted in doing so after being advised that the communication was prohibited.

(3) All communications and statements forwarded to the Docket Section under this section shall be placed in the public file which shall be associated with, but not made a part of, the record of the proceedings to which the communication or statement pertains.

(4) Service on parties. The Administrator shall serve a copy of each communication and statement forwarded under this section on all parties to the proceedings. However, if the parties are numerous, or if other circumstances satisfy the Administrator that service of the communication or statement would be unduly burdensome, he or she may, in lieu of service, notify all parties in writing that the communication or statement has been made and filed and that it is available for inspection and copying.

(5) Service on maker. The Administrator shall forward to the person who made the prohibited *ex parte* communication a copy of each communication or statement filed under this section.

(f) *Effect of ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the record for decision unless introduced into evidence by a party to the proceedings.

(g) *Sanctions.* A party or participant who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such com-

munication, may be subject to any appropriate sanction or sanctions, including, but not limited to, exclusion from the proceedings and adverse rulings on the issues which are the subject of the prohibited communication.

[45 FR 81578, Dec. 11, 1980, as amended at 53 FR 15784, May 3, 1988]

# APPENDIX I—FINAL PREHEARING ORDER

## Case Caption

### Final Prehearing Order

A prehearing conference was held in this matter pursuant to Rule 21 of the Administration's Rules of Practice for Adjudicative Proceedings, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_ o'clock \_\_\_\_ M.

Counsel appeared as follows:

For the Administration staff:

For the Respondent(s):

Others:

## 1. NATURE OF ACTION AND JURISDICTION.

This is an action for \_\_\_\_\_

and the jurisdiction of the Administration is involved under Section \_\_\_\_ of Title \_\_\_\_ U.S.C. The jurisdiction of the Administration is (not) disputed. The questions of jurisdiction was decided as follows:

## 2. STIPULATIONS AND STATEMENTS.

The following stipulations and statements were submitted, attached to, and made a part of this order:

(a) A comprehensive written stipulation or statement of all uncontested facts;

(b) A concise summary of the ultimate facts as claimed by each party. (Complaint Counsel must set forth the claimed facts, specifically; for example, if violation is claimed, Complaint Counsel must assert specifically the acts of violation complained of; each respondent must reply with equal clarity and detail.)

(c) Written stipulations or statements setting forth the qualifications of the expert witnesses to be called by each party;

(d) A written list or lists of the witnesses whom each party will call, a written list or lists of the additional witnesses whom each party may call, and a statement of the subject on which each witness will testify;

(e) An agreed statement of the contested issues of fact and of law, and/or separate statements by each party or any contested issues of fact and law not agreed to;

(f) A list of all depositions to be read into evidence and statements of any objections thereto;

(g) A list and brief description of any charts, graphs, models, schematic diagrams, and similar objects that will be used in opening statements or closing arguments, but will not be offered in evidence. If any other such objects are to be used by any party, they will be submitted to opposing counsel at least three days prior to hearing. If there is then any objection to their use, the dispute will be submitted to the Presiding Officer at least one day prior to hearing;

(h) Written waivers of claims or defenses which have been abandoned by the parties.

The foregoing were modified at the pretrial conference as follows:

[To be completed at the conference itself. If none, recite “none”]

### 3. COMPLAINT COUNSEL’S EVIDENCE.

3.1 The following exhibits were offered by Complaint Counsel, received in evidence, and marked as follows:

[Identification number and brief description of each exhibit]

The authenticity of these exhibits has been stipulated.

3.2 The following exhibits were offered by the Complaint Counsel and marked for identification. There was reserved to the respondent(s) and party intervenors, if any, the right to object to their receipt in evidence on the grounds stated:

[Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality]

### 4. RESPONDENT’S EVIDENCE.

4.1 The following exhibits were offered by the respondent(s), received in evidence, and marked as herein indicated:

[Identification number and brief description of each exhibit]

The authenticity of these exhibits has been stipulated.

4.2 The following exhibits were offered by the respondent(s) and marked for identification. There was reserved to Complaint Counsel and party intervenors, if any, the right to object to their receipt in evidence on the grounds stated:

[Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality]

### 5. ADDITIONAL ACTIONS.

The following additional action was taken:

[Amendments to pleadings, agreements of the parties, disposition of motions, separation of issues of liability and remedy, etc., if necessary]

### 6. LIMITATIONS AND RESERVATIONS.

6.1 Each of the parties has the right to further supplement the list of witnesses not later than ten (10) days prior to trial by furnishing opposing counsel with the name and address of the witness and general subject matter of his or her testimony and filing a supplement to this pretrial order. Thereafter additional witnesses may be added only after application to the Presiding Officer, for good cause shown.

6.2 Rebuttal witnesses not listed in the exhibits to this order may be called only if the necessity of their testimony could not reasonably be foreseen ten (10) days prior to trial. If it appears to counsel at any time before trial that such rebuttal witnesses will be called, notice will immediately be given to opposing counsel and the Presiding Officer.

6.3 The probable length of hearing is — days. The hearings will be commenced on the day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o’clock \_\_\_\_\_ M. at (location) \_\_\_\_\_.

6.4 Prehearing briefs will be filed not later than 5:00 p.m. on \_\_\_\_\_. (Insert date not later than ten (10) days prior to hearing.) All anticipated legal questions, including those relating to the admissibility of evidence, must be covered by prehearing briefs.

This prehearing order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. It will control the course of the hearing, and it may not be amended except by consent of the parties and the Presiding Officer, or by order of the Presiding Officer to prevent manifest injustice.

\_\_\_\_\_  
(Presiding Officer’s Name)

\_\_\_\_\_  
(Presiding Officer’s Title)

APPROVED AS TO FORM AND SUBSTANCE

Date: \_\_\_\_\_.

\_\_\_\_\_  
Complaint Counsel.

\_\_\_\_\_  
Attorney for Respondent(s).

NOTE: Where intervenors appear pursuant to §511.17 the prehearing order may be suitably modified; the initial page may be modified to reflect the intervention.

## PART 512—CONFIDENTIAL BUSINESS INFORMATION

Sec.

512.1 Purpose and scope.

512.2 Applicability.

512.3 Definitions.